BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No.: 14-16

BALTIC AUTO SHIPPING, INC.,

Complainant,

– vs. –

MICHAEL HITRINOV
a/k/a MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC.,

Respondents.

COMPLAINANT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR PARTIAL SUMMARY DECISION

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Pursuant to the Federal Maritime Commission's (the "Commission") order of June 15, 2015, Complainant, through its Counsel, Marcus A. Nussbaum, Esq. respectfully submits this supplemental memorandum in opposition to respondents' Motion for Partial Summary Decision.

INTRODUCTION

As set forth below, complainant submits that there is a fourth class of shipments to consider in ruling on this motion, which are not covered under the 2011 Settlement Agreement and not time barred. This memorandum is also submitted to clarify arguments made, among other things, regarding the respondents engaging in a discriminatory pricing scheme, the continuing violation doctrine, constructive notice, and interpretation of the Settlement Agreement.

POINT 1 – THERE IS A FOURTH CLASS OF SHIPMENTS FOR THE COMMISSION TO CONSIDER IN THIS MOTION

As the Commission may recall, during oral argument[1], the Commission explained that there were three groups of shipments to be discussed[2], to wit:

- Group one - Shipments that were begun between 2007 and 2011 that had been delivered and shipment completed before Baltic commenced its New Jersey action;
- Group two - Shipments involved in the 2011 New Jersey settlement agreement; and
- Group three - Twenty one shipments originating from the port of Savannah, Georgia which are the subject of Complainant's motion for reconsideration, currently pending before the Commission.

Regarding group two, the Commission was unsure where to place five shipments originating from Long Beach, California and destined for Klaipeda, Lithuania.[3] The Commission asked why five shipments were not included in the 2011 settlement agreement (i.e. why the allegations in the

[1] All citations to the accompanying hearing transcript are identified in brackets with page and line number as appropriate.
[2] [pp. 17-22]
[3] Id.

2011 Complaint mentioned 167 containers when the 2011 Settlement Agreement only listed 162 containers).[4]

The Long Beach shipments were also discussed in the parties' motion papers, and Complainants explained that respondents unlawfully contacted complainants' customers directly (without complainant's permission) and provided them the amounts demanded by respondents for the containers. That unlawful contact of complainants' customers resulted in complainant contacting Ms. Tara Nielsen of the Commission on November 21, 2011. After the Commission involved itself, Complainants were reasonably assured that the cargo wouldn't be released without Complainants' permission. Upon contacting the consignee/shipper to collect payment for those shipments in early January 2012, complainants learned that the cargo had already been released.

In response to that allegation, respondents asserted in paragraph "5" their certification of May 26, 2015 in support of their motion that these five shipments didn't belong to the complainants, and rather that they belonged to an entity known as M&E Baltic (incorrectly identified by respondents as "ME Baltic"). Notably, respondents admitted in paragraph "10" their certification of March 23, 2015 that for these shipments, they received shipping instructions directly from complainant. Also, during the course of discovery, respondents produced ocean liner bills of lading for these shipments and did not object to their production on the basis that these shipments are not the complainant's.

It is submitted that the five Long Beach shipments and ten additional shipments[5] fall into a *fourth class* of shipments which are, to wit: shipments where respondents: (1) unlawfully contacted

[4] Id.

[5] The Commission is referred to the spreadsheet in Exhibit "N-1" to the Presniakovas Affidavit in opposition to respondents' motion for partial summary decision. This is the same spreadsheet identified in Exhibit "F" to the 2011

complainants' customers directly; (2) collected payment directly from those customers or neutrals/third-parties; and (3) issued telex releases for the cargo without informing complainant, without obtaining complainant's consent, and leaving complainant unable to collect payment from its customers for services rendered to the shipper.[6]

To clarify the timing of these events and whether the alleged Shipping Act violations occurred within three years of the filing of the complaint herein, it is important to understand the following points:

- Before signing the 2011 Settlement Agreement, respondents demanded that the Long Beach Shipments (and ten shipments mentioned above) be excluded from the agreement because complainants' customers agreed to pay the extra shipping charges of approximately $175.00 per container demanded by respondents[7] – it is important to understand that *at no time* was this $175.00 per container to be paid directly to respondents by the neutral/third-party discussed herein, nor did complainants consent to respondents forwarding a telex release to the neutral/third-party for the containers or release the containers without complainant's knowledge or permission, and consequently without the opportunity to collect payment from the shipper/consignee for services rendered.

- Complainants knew that respondents unlawfully contacted complainants' shipper/consignee directly without permission and provided them the amounts demanded by respondents for the containers, but were not aware that cargo was actually released until early 2012.

The misrepresentations made by respondents regarding complainants' alleged non-relation to the five Long Beach shipments and their alleged connection to M&E Baltic are addressed in the

Complaint, and is the same spreadsheet also known as Attachment "B", which is not currently the subject of this motion. This is the reason that the specific booking numbers for the shipments have not been provided now, but the booking numbers can be provided upon request of the tribunal. In addition, page "4" of respondents' status report to the Commission acknowledges that this spreadsheet "is the same list as appears as Exhibit "F" to the 2011 DNJ Complaint." This spreadsheet contains the ten additional shipments not included in the 2011 Settlement Agreement.

[6] Regarding points "2" and "3" above, the record demonstrates that these facts were discovered after signing the 2011 Settlement Agreement, in or about January of 2012.

[7] Please see the spreadsheet contained within Exhibit "N-1" to the Presniakovas Affidavit, which identifies the specific breakdown of the extra charges demanded by respondents.

accompanying certification from the employee of M&E Baltic that dealt directly with respondents regarding the containers, and in the certification from the owner of G&G Auto Sales ("G&G"), which was the shipper/exporter of record.

These certifications explain that: (1) G&G retained the services of complainant for export of the five containers; (2) in late 2011 G&G was contacted by respondents who placed a hold on the containers and refused to release them to the consignee, causing G&G and its consignee to incur storage/demurrage charges; (3) respondents subsequently offered to release the cargo directly to the consignee *without involving Baltic Auto Shipping Inc.* in exchange for payment of an additional $500.00 per container, over and above the $3366.00 per container already paid for ocean freight; (4) at G&G's request, M&E Baltic assisted G&G with obtaining release of the containers and that M&E Baltic became involved in this matter because they were familiar with respondents -- therefore, they stepped in and acted as a neutral third-party; (5) in early 2012, when complainant contacted G&G regarding payment for the shipment of the containers, G&G notified them that the containers had been released directly by respondents; (6) M&E Baltic never requested that respondents book these shipments on their behalf nor on behalf of G&G; (7) while negotiating the release of the shipments, and prior to the release, respondents contacted M&E Baltic by phone and explained that the cargo would be released upon compliance with two conditions: (a) that the shipper/consignee pay an additional $500 per container, over and above the $3366.00 per container already paid by consignee for ocean freight, and (b) that M&E Baltic send respondents an email, dictated to M&E Baltic by Hitrinov by telephone stating that complainant was not supposed to be listed as the shipper for these containers.

Therefore, with respect to the five Long Beach shipments, (and in light of the admissions made in respondents' certification) there is no question that the bookings were provided to complainant and that respondents violated the Shipping Act in releasing these containers without permission.

Further on the issue of unlawful release of containers, the Commission is referred to the spreadsheet contained within Exhibit "N-1" to the Presniakovas Affidavit. As explained above, that exhibit is identical to Exhibit "F" to the 2011 DNJ Complaint, which lists a total of 546 containers. The notations in the ninth column of that spreadsheet indicate that of the 546 containers, 369 had already arrived and had been released. The remaining 177 containers were the very same containers at issue in the 2011 lawsuit and had either arrived and had not been released, or were in transit.[8] Of those 177 shipments, 5 were the Long Beach Shipments, 162 were addressed in the settlement agreement, leaving ten containers that were not addressed by the parties during this motion, all ten of which were not covered under the settlement agreement[9], or form the basis for a continuing violation as discussed below.

POINT 2 – THE CONTINUING VIOLATION DOCTRINE, CONSTRUCTIVE NOTICE, AND SEATRAIN V. GITMO REVISITED

During oral argument, the Commission repeatedly addressed the issue of respondents' alleged continuing violations.[10] Complainant respectfully provides clarification on this issue. As the Commission may recall, in *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth.*, 18 S.R.R. 1079 (ALJ 1979), the Commission explained that "In the case of a continuing injury, each

[8] Paragraphs "31" through "33" of the 2011 DNJ Complaint incorrectly made reference to there being 167 containers at issue in the lawsuit when there were actually 177 containers identified in the spreadsheet.

[9] The Commission is respectfully referred to ¶ "6" of respondents' counterclaim in this matter, where respondents allege "…Respondent EUL has concluded that Complainant has failed to pay for a number of shipments." – The reason for Complainants' failure to pay for these shipments is because respondents collected payment directly from the neutral/third-party and/or shipper/consignee.

[10] [pp. 26-28, 36-36, 86-92]

time a party is injured by an act of another, a new cause of action accrues to recover the damages caused by that act, and with regard to such damages, the statute of limitations runs from the commission of the new (continuing) act."

Amongst the alleged continuing violations discussed at oral argument were: (1) respondents' continued refusal to provide house bills of lading and shipping documents to complainant, although duly demanded; and (2) respondents' continued failure to publish tariffs for routes they provide to the public, and how the continued failure to publish tariffs allows respondents to continually engage in discriminatory pricing. During that discussion, the Commission inquired whether there was any evidence at this time that respondents failed to publish tariffs and whether there was evidence that respondents continue to engage in discriminatory pricing[11]. In response, the undersigned explained that: (1) in support of their motion for summary decision, respondents have failed to provide copies of tariffs allegedly published; and (2) that the evidence of discriminatory pricing is contained within the audit conducted by the Complainants.[12]

In addition to the foregoing, complainant now provides copies of respondents' tariffs, annexed hereto, and respectfully refer the Commission to the twenty one Savannah shipments and the fifteen shipments discussed above (including the five Long Beach shipments). With respect to the twenty one Savannah shipments, the evidence on record (contained in complainant's motion for reconsideration) demonstrates that for these shipments, respondents charged a rate for shipment (at the time of shipment, which was after the signing of the 2011 Settlement Agreement) that is

[11] [pp.89-90]
[12] Id.

not contained within published tariffs, and the respondents failed to provide house bill of ladings and other shipping documents.

The five Long Beach shipments were shipped prior to signing the 2011 Settlement Agreement. However, by releasing the shipments without involving Complainant and by collecting payment (and overpayment not in accordance with published tariffs) directly from the neutral third-party representing M&E Baltic: (1) the Shipping Act violations regarding the overcharges accrued within three years of the filing of the complaint; and (2) the Shipping Act violations regarding unlawful release of containers accrued within three years of the filing of the complaint when complainant learned no earlier than January of 2012 that the containers had been released.

In light of the fact that the twenty one Savannah bookings all shipped after signing the 2011 Settlement Agreement, the Shipping Act violations regarding discriminatory pricing are timely, as well as the violations involving failure to provide proper and lawful documents of ownership (bills of lading); shipping invoices and the terms and conditions of transport, proof of ownership with a correct bill of lading and contract for transport. In essence, respondents' discriminatory pricing scheme and refusal to provide documents to complainant has "continued" to a date certain within the three year limitations period for bringing a claim for reparations. With respect to the ten additional shipments not included in the 2011 settlement agreement, it is submitted that respondents' shipping act violations also "continued" to a date certain within the three year limitations period for bringing a claim for reparations before the commission.

With respect to the fourth class of shipments identified above, it is also submitted that the constructive notice doctrine does not preclude complainant's claims regarding respondents' failure to charge in accordance with a published tariff. This is in light of the fact that respondents charged (and overcharged) for ocean freight for these shipments and collected the overpayments directly

from the shipper/consignee or neutral third-party. As explained above, these events occurred without the knowledge of complainant and were discovered in January of 2012 when complainant contacted its customers for purposes of collecting payment.

On the issue of constructive notice the Commission also asked about a federal lawsuit referred to in complainant's audit, with docket number: 09-cv-04714, and if the plaintiff in that suit was charged rates different than what Baltic would charge.[13] For the Commission's reference, that lawsuit was mentioned in the audit solely as an example of how the respondents provided a rate/tariff to the plaintiff in that case, which same rate/tariff was never provided to complainant. The invoice, house bill of lading, and respondents' affidavit from that lawsuit explaining that the rate/tariff was for shipment of personal goods is annexed hereto. The main point is that this rate/tariff (TLI #001-008 rate for Personal Goods at $700 per cubic meter) was never provided to the complainant, and there was no way for the complainant to know that they were not provided until the audit was conducted.

POINT 3 – THE COMMISSION IS NOT REQUIRED TO INTERPRET THE SETTLEMENT AGREEMENT TO FIND THAT SHIPPING ACT VIOLATIONS OCCURRED

During oral argument, the Commission inquired if Complainants believed that the Commission has jurisdiction to interpret the terms of the 2011 Settlement agreement. That inquiry was made during discussion of complainants' allegation that respondents' failure to provide house bills of lading and other documents was a Shipping Act violation.[14] Complainants argued that the failure to provide shipping documents was a continuing violation, and that the signing of the

[13] [p. 52 ln. 6-8]
[14] [pp.26-34]

settlement agreement on November 29, 2011 fixes the latest possible date of the violation to be November 29, 2011, within three years of this action.[15]

While discussing this issue, the Commission inquired whether the failure to provide documents was a Shipping Act violation or a violation of the settlement agreement (to which Complainants responded is a violation of both), and upon information and belief, the Commission quoted directly from the U.S. District Court for the District of New Jersey Order by Judge Hochberg, dated December 7, 2011 (a copy of which is annexed hereto), which explained as follows: "If the settlement agreement is not consummated, the court will entertain an application solely to enforce the terms of the settlement agreement".[16] The Commission then inquired: if it's Baltic's contention that the settlement agreement obligated Empire to produce documents all the way back to 2007 … why isn't it up to Baltic to go to Judge Hochberg and say they haven't complied with these agreements."[17]

Up front, it is submitted that the settlement agreement is not applicable to the fourth class of shipments identified above, nor to the twenty one Savannah shipments. Therefore, no interpretation of the settlement agreement is necessary with regard to respondents' refusal to provide house bills of lading and other shipping documents.

With regard to other shipments, the Commission need not interpret the settlement agreement to find that Shipping Act violations have occurred. While it may be possible that an interpretation may be necessary to determine *when* the violations occurred, this does not preclude the complainant from going forward with its claims here. Up front, there are two points for the

[15] Id.
[16] Id.
[17] Id.

Commission to consider on this issue. The first point is that Judge Hochberg made it clear that the Court is without jurisdiction to enforce the settlement agreement, specifically explaining, in an order on January 16, 2015 (annexed hereto), as follows: "Three years after dismissal and consummation of the settlement, Defendant sought an order to enforce the settlement agreement and an injunction restraining Plaintiff from proceeding with an action before the Federal Maritime Commission. However, the Court's 2011 Order did not retain jurisdiction indefinitely. The Court is without jurisdiction to enforce a breach of a settlement agreement consummated over three years ago. Moreover, it appears the original matter was settled before proper service of the Complaint and filing of proof of service, and thus before this Court had acquired jurisdiction. Accordingly, this matter remains closed."

As the Commission may be aware, respondents subsequently initiated a second New Jersey District Court action against the complainants, again seeking damages for breach of the settlement agreement and for specific performance of the agreement. While complainants have counterclaimed in that forum for breach of the settlement agreement, it is submitted that the complainants do not agree that the district court is the proper forum for addressing the issues in the case at bar. It is further submitted that complainant was left with no choice but to counterclaim in order to preserve their right to such a claim if it is ultimately determined by the Commission that the district court is the proper forum. Regardless of the foregoing, there is no question that the Court is without jurisdiction to adjudicate the remainder of the issues in the case at bar, which are inherently Shipping Act violations.

The second point for consideration in deciding if interpretation of the settlement agreement precludes complainant from going forward with its claims pertains to the matter of *Anchor Shipping Co. v. Alianca Navegacao E. Ligistica, Ltda.*, FMC Docket No.: 02-04, 2006 WL

3071243 (2006), holding that if the Commission finds that the "Shipping Act violations are intertwined with breach of contract issues in the present case, ***such matters must be resolved before the Commission***."

Therefore, due to the fact that the alleged grievances in this matter are inherently shipping act violations, which may be intertwined with breach of contract issues, it is submitted that interpretation of the settlement agreement doesn't preclude complainant from moving forward with its claims. Again, the interpretation required is not needed in order to determine *if* a shipping act violation has occurred, only *when* it had occurred.

POINT 4 – ALL FACTS RELATED TO THE INSTANT PROCEEDING BEFORE THE COMMISSION WERE NOT KNOWN AT THE TIME THAT THE 2011 DNJ ACTION WAS FILED

During oral argument, the Commission inquired whether or not the complainants were aware of all facts needed in order to file a Shipping Act complaint as of November 22, 2011, when the 2011 DNJ action was filed.[18] The Commission also discussed the similarities between the allegations in the 2011 DNJ complaint as compared against the allegations in the FMC Complaint.[19] On this issue it is submitted that there were multiple shipping act violations that occurred subsequent to the 2011 DNJ action and subsequent to the execution of the settlement agreement. On this issue, the Commission is referred to the arguments on the record regarding: respondents' untimely release of containers; unauthorized release of containers and unlawful direct contact with complainants' customers; respondents' instruction to the ocean liner by telex release to collect funds from complainant's consignee for a container that had already been prepaid; respondents' ceasing communications with complainant regarding containers that had still not

[18] [p. 35, 52-56]
[19] Id.

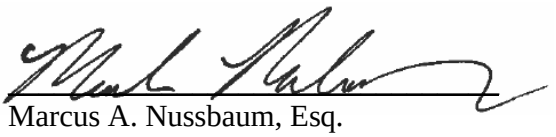
been released by respondents; respondents' post settlement agreement continued discriminatory pricing scheme, etc.

CONCLUSION

Accordingly, for the reasons set forth above, it is respectfully requested that the Commission exercise its authority to protect the public from respondents' unlawful continued acts, and prevent the respondents from further injuring NVOCC's and shippers by way of their discriminatory pricing schemes. Accordingly, complainant requests that the instant motion be denied.

Dated: July 7, 2015
Brooklyn, NY

Respectfully Submitted,



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